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In the
Supreme Court of the United States

OCTOBER TERM, 1970

70-96

No. 70-96

PHILIP J. PICARD,
PETITIONER,

v.

JAMES J. CONNOR,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the court of appeals is reported at 434 F.2d 673. (A. 4) The opinion of the district court is reported at 308 F. Supp. 843. (A. 50) The opinion of the Supreme Judicial Court of Massachusetts is reported at 353 Mass. 197. (A. 112)

Jurisdiction

The judgment of the court of appeals was entered on December 10, 1970. The petition for a writ of certiorari was filed on March 10, 1971 and was granted on May 3, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Is habeas corpus available to test the validity of an indictment valid under state law and obtained under a procedure which is valid under state law?

2A. Should the Court below have remanded Connor to his state court remedies in view of the fact that the Supreme Judicial Court of Massachusetts had never been given any opportunity to construe this Massachusetts statute in light of federal constitutional challenge and in view of the requirements of 28 U.S.C. 2254(b)?

B. Did the Court of Appeals impermissibly enlarge the scope of review on habeas corpus to that of an appellate tribunal supervising the administration of criminal law in a state by deciding an issue on a ground not presented to the state court, not set forth in the petition for habeas corpus as a ground for relief and not decided by the federal district court?

3. Was it proper for the court below to find that the application of Massachusetts General Laws (Ter. Ed.) c. 277, §19 violated the Equal Protection Clause, since the statute is fair on its face and there was no evidence on the record that the statute was being unfairly applied or that the respondent was singled out for different treatment or that the alternate procedure was "wholly arbitrary"?

Constitutional Provision

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

Title 28, United States Code, Section 2254(b), which provides:

> "An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Massachusetts General Laws Chapter 277 §19:

> §19. *Name of accused person; description by fictitious name; entry of true name.* If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement;

but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

Statement

A. The Court Proceedings

On August 4, 1965, the Suffolk County Grand Jury returned an indictment for murder in the first degree against Donald E. Landry otherwise known as Emo Landry and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown" (A. 71). Shortly after the return of the indictment, petitioner was arrested (A. 75).

On August 9, 1965, the prosecutor filed a motion—under the provisions of Massachusetts Gen. Laws c. 277 §19—to amend the indictment by substituting the name of the respondent in place of "John Doe" (A. 73). The respondent objected (A. 78). The motion was allowed by the Chief Justice of the Commonwealth of Massachusetts (A. 59, 73).

On August 10, 1965, the docket entry of August 9 was "corrected so as to read as follows: Commonwealth files motion to amend indictment Court (Tauro, C.J.) having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name." (R. 59).

On September 10, 1965, the respondent filed motions to quash and to dismiss the indictment (A. 61, 86, 88).

On August 24, 1965 and on September 15, 1965 the respondents contentions with regard to the "John Doe" indictments were brought to the attention of the Chief Justice

(in connection with other motions not now before this Court) and of another judge of the Superior Court of the Commonwealth of Massachusetts (A. 60, 61, 90).

On September 24, 1965 after an untranscribed hearing, the superior court judge denied the motions and Connor's exceptions were saved (A. 62).

The case was tried in March of 1966 and the respondent was found guilty of murder in the first degree with a recommendation by the jury that the death penalty be not imposed (See, e.g., Gen. Laws, c. 265 §2).

The case was appealed to the Supreme Judicial Court of the Commonwealth of Massachusetts. A conviction was affirmed by that court on August 22, 1967. *Commonwealth* v. *Doherty,* 353 Mass. 197. (A. 112). A petition for certiorari was denied by this Court on March 11, 1968, 390 U.S. 982. (O.T. 1967).

On or about December 18, 1968, the respondent filed a petition for a writ of habeas corpus in the United States District Court, District of Massachusetts (A. 17). The district court held a hearing and later the district court issued its opinion. See *Connor* v. *Picard,* 308 F. Supp. 843 (January 16, 1970). A certificate of probable cause issued in January, 1970. On May 28, 1970, James Connor filed an appeal from the decision of the United States District Court in the Court of Appeals (A. 13).

Arguments were heard in the Court of Appeals on September 11, 1970 (A. 2). The Court of Appeals rendered its judgment on December 10, 1970 (A. 2). On March 10, 1970, a petition for certiorari was filed in this court (A. 3). On May 3, 1971 this Court granted the petition.

B. The Facts of the Crime

The sufficiency of the Commonwealth's evidence was not challenged in the trial court, the Supreme Judicial Court,

the district court or the Court of Appeals. It showed, as reported by the Supreme Judicial Court that on Friday evening, April 30, 1965, one Miss Elizabeth Moore and Ronald Hayes drank beer in the company of the co-defendants William Doherty and his wife, Janice Doherty, at the Sportsman's Cafe in Dorchester. Later, she, Hayes, the Dohertys, Davis (the deceased), and his friend Ronald Edwards gathered at the Doherty apartment. The company of six had supper in the kitchen. Beer was served. Doherty and Davis left the kitchen and went into the den. Upon their reappearance, Hayes saw that David had a gun in his belt. Edwards then left on Davis' crytic instruction to "Go get the queen," and "Go pick up the payroll" (according to Mrs. Doherty's testimony, "payload" or "payroll"). (353 Mass. 200-201) (A. 112, 113).

Hayes and Moore went to the latter's room, and while there heard noise and commotion. Moore opened the door and saw Mrs. Doherty making a telephone call. Davis and Doherty had returned to the den. On his wife's summons, Doherty again came out of the den and continued the telephone conversation which was not overheard. Doherty returned to the den. Mrs. Doherty then took the telephone to Moore's room, made a call, asked for "Emo," and, while waiting, told Hayes and Moore that Davis had two guns at Doherty's head and that she had to get someone to help him. She repeated this statement on the telephone. Doherty then entered the room again and said to his wife, "Janice, tell her this guy is Bobby Davis who's against me, if something happens before they get up, and tell him to bring his piece and get up here." Mrs. Doherty said, "[B]ring your piece." Upon completion of the call the Dohertys left the room. (353 Mass. at 201) (A. 113).

Approximately five minutes later Mrs. Doherty returned, made another telephone call and said, "Hello, Emo, what's

taking you so long? Why aren't you up here? He's going to kill Billy [Doherty]. Will you please come up? Take a cab, Emo. We're at 116 Dakota Street." Mrs. Doherty asked Moore for the cab money and told Moore and Hayes that they had better leave. "There's going to be trouble. . . . Emo is coming up, and he has a big gun. . . . [H]e knows how to use it . . . [I]f you want to leave, go ahead. Get out of here." Moore and Hayes declined to leave. (353 Mass. at 201) (A. 113, 114).

Moore went downstairs to meet the cab. While there she saw Edwards returning in Edward's car with another man, Adrian Delaney. Edwards drove away, Delaney remained on the porch with Moore, who then saw a cab come up Dakota Street and stop at a side street. Two people got out of the cab and went into some nearby bushes. One of them was carrying a "violin case." The jury, from later testimony, could have inferred that these two were Landry and Connor.[1] (353 Mass. at 201-202) (A. 114).

Delaney pointed a gun at Moore, calling her "Mrs. Doherty." Doherty appeared on the porch from upstairs with a gun "in his waist". Doherty told Moore to get out of there. A fight between Doherty and Delaney followed. Moore ran off the porch along the side of the house to the garage. While there, she heard a shot. Delaney ran past her down Iowa Street. She heard another shot from upstairs. Then she saw "Jimmy Conner" carrying a long case. Moore had previously met Connor through Mrs. Doherty's parents, the Bakers, who lived in the same house as

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[1] The co-defendant, Donald Landry, was also convicted of murder in the first degree, while one other co-defendant, Janice Doherty, was convicted as accessory after the fact. The Supreme Judicial Court ordered a directed verdict of not guilty as to one co-defendant, William R. Doherty on one indictment charging him as an accessory before the fact to murder (353 Mass. at 204). (A. 117). He was, however, convicted of being an accessory after the fact to the murder (353 Mass. at 205) (A. 117).

the Dohertys on the second floor. Moore asked Connor what she should do. He answered "Just stay there and be quiet." Moore saw Hayes run from the house, get in his car and leave. On her return to the house from the garage, Moore saw Davis lying on the front porch. (353 Mass. at 202) (A. 114).

Hayes' testimony of events in the Doherty apartment from the time of his arrival to the time Moore went downstairs to meet the cab was, in most particulars, corroborative of Moore's testimony. While Mrs. Doherty was making the telephone call to Emo, Doherty told his wife to "Tell Emo [that] Davis did it if I am killed." In response to a question by Moore, Doherty said that Davis was asleep on the couch in the den and that he did not try to take the guns away from Davis because he was afraid he would get shot if he woke Davis. (353 Mass. at 202) (A. 114, 115).

After Moore had gone downstairs, Hayes saw Doherty take the two guns away from Davis, who was sleeping. Both guns were Lugers. Doherty kept one. He gave the other to Hayes and told him to protect his (Doherty's) family. Doherty went downstairs. From the front porch on the third floor Hayes saw two men get out of a cab, one carrying a gun case. About the same time, a car stopped in front of the house and Hayes heard a gunshot on the porch. (353 Mass. at 202, 203) (A. 115).

"Connors" came upstairs, grabbed Hayes by the throat, and pushed him against the wall. Hayes saw no weapon on Connor. Hayes told him, "I'm on your side ... I'm with you. I know nobody." Mrs. Doherty came into the room and said, "Not him; the one on the couch." Hayes heard someone coming up the stairs and also heard "bolt action or shotgun action or something like that." Landry came in and pointed a "rifle" at Hayes. Mrs. Doherty said, "Not him, the one on the couch." Landry "put the gun in Davis'

belly," said "hey, hey" twice, and "shot him in the belly." Mrs. Doherty came running into the room and said, "Get him out of here." Landry and Connor picked Davis up, "one under each arm," dragged him to the doorway and "let him go." Shortly afterwards, Hayes left the premises. He observed blood spattered on the front stairs and passed Davis who was "sprawled out on the front porch." Hayes got into his car, drove around the corner, dropped the Luger into a sewer and went home. (353 Mass. at 202-203) (A. 115).

Moore testified that after the shooting Doherty, his wife, Moore, and Mrs. Baker met in the Baker apartment where it was decided by all, including Moore, that they would tell the police "that two guys came up here and broke in and shot him". Moore said to Doherty, "I'll be a witness for you Billy. I know you didn't shoot him." Doherty called the police. When the police arrived about 3 a.m. on Saturday, May 1, Doherty was on the porch standing beside Davis' body. Doherty told the police that he had been in a fight, had run from the porch and found Davis' body when he returned. Subsequently, the medical examiner reported that Davis died of a shotgun wound in the chest. (353 Mass. at 203) (A. 115, 116).

The district court's findings as to the facts were substantially similar, although less detailed, as those found by the Supreme Judicial Court. (308 F. Supp. at 844) (A. 51). Additionally the district court found that Mrs. Doherty had testified Connor was not present at her home on the night of the crime, and that Connor had not testified but instead had elected to make an unsworn statement to the jury in accordance with the Massachusetts practice at that time. (308 F. Supp. at 844) (A. 51, 52).

Summary of Argument

I. Petitioner argued in the Court, below *inter alia,* that his conviction of murder in the first degree was unconstitutional because he was tried upon an indictment which initially described him as "John Doe, the true name and a more particular description of said John Doe being to said jurors unknown," and which was subsequently amended, on motion of the prosecutor pursuant to the provisions of Mass. Gen. Laws, ch. 277, sec. 19, to reflect his true name. The validity of state indictments are questions of state law and are not the proper subjects for habeas corpus relief. The question presented is one of state law and does not rise to the dignity of a federal constitutional right warranting habeas corpus relief. *Knewel* v. *Egan,* 268 U.S. 442, 446 (1925)

II. The Court below erred in not requiring Connor to exhaust his state court remedies.

There is a need for exhaustion unless a petitioner can show "the existence of circumstances rendering [state] process ineffective to protect the rights of the prisoner" 28 U.S.C. c. 2254 (b).

Since equal protection claims require a finding of state legislative purposes, this circumstance alone required the Court below to remit Connor to the state court as a matter of good judicial policy. Comity requires that the state-federal balance not be subject to unnecessary strains by a failure to make exhaustion a viable policy.

The Court below should not have enlarged its scope of review to decide an issue not alleged as a ground for relief in the petition for habeas corpus and not decided by the federal district court or the state court.

III. A. The Massachusetts statute, as construed by the Supreme Judicial Court requires a court to find probable cause to enter a person's name on the court records. The entry of the name is "decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States,* 333 U.S. 10, 13.

B. Lower federal courts have permitted somewhat lesser changes in name even in the absence of such a broad legislative mandate. *U.S.* v. *Fawcett,* 115 F.2d 764 (3rd Cir., 1940).

C. The state legislature may validly provide for the simplification of criminal pleadings and for the proper functioning of its grand juries. Such purposes are valid and well within the state's power to enact.

D. There is no record support for the finding of the Court below that petitioner was singled out for different treatment.

The Massachusetts statute applies to all types of misnomers in a criminal cases. The classification, therefore, does not concern itself with race, color, national origin, age, sex, political leanings, financial status or any other readily identifiable group. On its face, the statute is a perfectly proper criminal pleading statute. The statute does not, on its face, discriminate against a disadvantaged group.

There is no evidence on this record of any purposeful or intentional discrimination in the statute as applied. Since there is no record support for the court below's conclusion that Connor had been singled out for different treatment by the state nor is there any record support for the conclusion that Massachusetts did not confer benefits with an even hand there was no factual basis on the record to conclude that the Equal Protection Clause had been violated.

Argument

I. A Charging Procedure Which Satisfies State Law and Does Not Violate Any Federally Protected Right Does Not Present an Issue Cognizable in Habeas Corpus Proceedings.

Questions of state law are generally matters for state courts. The Writ of Habeas Corpus is used for the safeguarding of fundamental federally protected rights.

> "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." ...
>
> *Townsend* v. *Sain*, 372 U.S. 293, 311-312. (1963).

In the present state of the law, the grand jury requirement of the Fifth Amendment is not binding on the states by virtue of the Fourteenth Amendment. *Hurtado* v. *People of State of California*, 110 U.S. 516, 538 (1884); *Gaines* v. *Washington*, 277 U.S. 81, 86-87 (1928); See *Beck* v. *Washington*, 369 U.S. 541, 545, 579 (1962); *Malloy* v. *Hogan*, 378 U.S. 1, 4 n. 2 (1964).

The habeas corpus petition alleged that Connor was not indicted by a grand jury and that he had a constitutional right to be indicted by a grand jury (A. 22, 23).

A. *The State Indictment Under Which Respondent Was Tried Was A Valid Indictment Under The Laws Of The Commonwealth Of Massachusetts.*

On August 4, 1965, the Suffolk County Grand Jury returned an indictment against one Landry "and John Doe, the true name and a more particular description of the said John Doe being to said jurors unknown." (A. 71). The indictment was signed by the foreman of the Grand Jury (A. 72). The signature of the foreman indicating that the indictment is a "true bill" is "the proper evidence that it was found by twelve or more grand jurors...." *Turns* v. *Commonwealth*, 47 Mass. (6 Met.) 224, 233 (1843). The indictment or "true bill" was returned, as are all indictments in Massachusetts, by a vote of the grand jury. Thereafter, in this case, as in all other felony cases in Massachusetts, the indictment was "received by the court as an official accusation(s) of the grand jury, and placed upon its files and made a part of its record." *Commonwealth* v. *Smyth*, 65 Mass. (11 Cush.) 473, 476 (1853). Shortly after the return of the joint indictment against Landry and Doe, the respondent was arrested.[2]

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[2] The respondent's motions in the state court alleged that he was denied the right to be indicted by a grand jury and that his arrest was therefore illegal (A. 86, 88). From the opinion of the Supreme Judicial Court of Massachusetts and the federal district court it appears that the only issue litigated as to the arrest was the question of whether the indictment was valid and proper, 353 Mass. at 205. A reading of the opinion indicates that no statements were taken at the arrest, therefore, no problem arises under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). It appears too, that the witnesses apparently knew the defendant so that there was no problem under *United States* v. *Wade*, 388 U.S. 218 (1967) or *Gilbert* v. *California*, 388 U.S. 263 (1967) (353 Mass. 202) (A. 114). The question of what facts were brought to the chief justice's attention to constitute probable cause was not raised nor was the question of whether the officers had probable cause to arrest. The issue of whether an illegal arrest without any seizure of evidence bars any trials was not raised in this case. Under Massachusetts law, an illegal arrest per se does not bar a court from acquiring

On August 9, 1965, a pleading entitled "Motion to Amend Indictment" was filed and allowed by the Chief Justice which substituted the name of James J. Connor (A. 59, 73). On August 10, 1965, the entry of August 9, 1965 was corrected as follows:

> "Court (Tauro, C.J.) having determined that the true name of John Doe has been discovered to be James J. Connor orders the name James J. Connor to be entered on the record." (A. 59).

The Massachusetts Supreme Judicial Court has held that such an indictment procedure is valid and constitutional under Massachusetts law and does not violate Article 12 of the Declaration of Rights. See *Commonwealth* v. *Gedzium,* 259 Mass. 453 (1927); *Commonwealth* v. *Doherty,* 353 Mass. 197 (1967) certiorari denied 390 U.S. 982; *Commonwealth* v. *Baldassini,* Mass. Ad. Sh. (1970) 989; See also *Commonwealth* v. *Capland,* 254 Mass. 556 (1926).

Thus, the indictment here is a valid indictment in the Commonwealth of Massachusetts.

The writ is not to be used to test an indictment unless it is constitutionally defective. *Knewel* v. *Egan,* 268 U.S. 442, 446 (1925); *Bergemann* v. *Backer,* 157 U.S. 655, 659 (1895).

The lower federal courts have uniformly held that unless

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jurisdiction. See *Commonwealth* v. *Tay*, 170 Mass. 192 (1898); *Commonwealth* v. *Gorman*, 288 Mass. 294, 300, 301 (1934); *Commonwealth* v. *Miller*, 297 Mass. 285, 287 (1937). See also *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Mahon* v. *Justice*, 127 U.S. 700 (1888); *Frisbie* v. *Collins*, 342 U.S. 519 (1952). Thus the issue presented to the state court was only one of whether this indictment was valid under state law.

Of course, it is equally possible that the officers had ample probable cause to arrest Connor. Hence, Connor chose to rely on his "constitutional right" to be named by a grand jury.

an indictment is so defective as to be constitutionally invalid, an indictment which is valid under state law does not raise a federal constitutional issue cognizable in habeas corpus proceedings. See, e.g. *Cappetta* v. *Wainwright,* 433 F.2d 1027, 1030 (5th Cir. 1970); *Gray* v. *Swenson,* 430 F.2d 9, 14 (8th Cir. 1970); *Johnson* v. *Turner,* 429 F.2d 1152, 1155 (10th Cir. 1970); *Henderson* v. *Cardwell,* 426 F.2d 150, 152 (6th Cir. 1970); *Murphy* v. *Beto,* 416 F.2d 98, 100 (5th Cir. 1969); *Via* v. *Perini,* 415 F.2d 1052, 1054 (6th Cir. 1969); *Mintzer* v. *Dros,* 403 F.2d 42, 43 (2nd Cir. 1967) *certiorari denied* 390 U.S. 1044; *Morford* v. *Hocker,* 394 F.2d 169, 170 (9th Cir. 1968) *certiorari denied* 392 U.S. 944; *Johnson* v. *Beto,* 383 F.2d 197, 198 (5th Cir. 1967).

It is for the state court, short of constitutional infirmity, to interpret its own statutes. *Brady* v. *Maryland,* 373 U.S. 83, 90 (1963); *United States ex rel. Almieda* v. *Rundle,* 255 F. Supp. 936 (D.C.E.D. Pa., 1963) *aff'd* 383 F.2d 421 (3rd Cir. 1967), *certiorari denied,* 393 U.S. 863 (1968).

Since, on this record, there is no evidence nor has there been any showing that Connor lost any benefits, rights or safeguards accorded to others charged with crime but named by the grand jury, the state's interpretation of its statute does not present a constitutional issue.

The allegations of this petition that petitioner had a constitutional right to be named by a grand jury did not present an issue of constitutional law cognizable in federal habeas corpus proceedings. The court below erred in elevating a matter of state procedure to the dignity of a federal constitutional right. See concurring opinion of Mr. Justice Frankfurter in *Paterno* v. *Lyons,* 334 U.S. 314, 322 (1948).

II. The Court of Appeals Erred In Not Remanding the Case to the State Court Because the Respondent Had Never Presented the Equal Protection Argument to the State Court.

In our opinion this is a classic case for the application of the doctrine of exhaustion of state remedies. The question presented is whether a state legislature in enacting a criminal pleading statute had a valid state purpose and whether the state legislature created reasonable classifications. Of course, a state legislative purpose and the construction of state statutes are exclusively state court functions. See, e.g. *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941); *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163-164 (1943); *Younger* v. *Harris,* 1971 —— U.S. ——.

The Massachusetts courts have never been given the opportunity to construe the legislative purpose of this statute in light of an equal protection claim. Thus, exhaustion was very important in order that the state's highest court be given at least one opportunity to consider a claim and make a determination as to legislative purpose and reasonableness of classification. Delicate federal-state relations are certainly subject to an unnecessary strain if a state court is denied the initial opportunity to construe the enactments of its legislature in the light of constitutional challenge.

In our opinion, the Court of Appeals should have required the respondent to raise this claim in the state court. Since the record contains nothing upon which the Court below could find "either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner," (28 U.S.C. §2254(b)) exhaustion should be mandatory.[3]

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[3] The relevant language was first enacted in 1948. Act of June 25, 1948, ch. 646, § 2254, 62 Stat. 967. Judicial development both

In the absence of such special circumstances, we think that the Court below erred in not following the Congressional mandate or the decisions of this Court that, except in "special circumstances" state petitioners be required to exhaust state remedies.

We realize that such a requirement is based on comity and is not jurisdictional *Ex Parte Hawk*, 321 U.S. 114 (1944). Nevertheless, we think that in the absence of any evidence of delay, oppressive action on the part of the state or other unusual circumstances judicial discretion must be exercised in favor of the rule of exhaustion. We find this reasoning all the more compelling in view of our state's responsiveness to the need for such remedies.[4]

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before and after the enactment of the statute recognized the special circumstances exception to the exhaustion requirement. *See*, *e.g.*, *Bowen* v. *Johnson*, 306 U.S. 19, 27 (1939); *Fulwood* v. *Stone*, 394 F.2d 939, 942 (D.C. Cir. 1967); *United States* v. *Follette*, 275 F. Supp. 548, 553 (S.D.N.Y. 1967). We read 28 U.S.C. 2254(b) as codifying existing law and not as changing the requirements for habeas corpus relief.

[4] We would point out that the Massachusetts General Court (i.e. the Massachusetts legislature) has not been unresponsive to this Court's request that the states enact legislation providing for post conviction relief. See *Case* v. *Nebraska*, 381 U.S. 336, 337 (1965) (Mr. Justice Clark concurring), p. 346-347 (Mr. Justice Brennan concurring). In 1966 the Massachusetts Legislature removed all time restrictions from the new trial statute. See G.L. c. 278 §29. Thus making this statute, a general post conviction relief statute. See *Earl* v. *Commonwealth*, 356 Mass. 181, 184 fn. 1 (1969); Mass. Adv. Sh. (1969) 963, 965 fn. 1. Massachusetts, of course, still has the writ of error. G.L. c. 250 and the writ of habeas corpus. G.L. c. 248 §1.

Nor has the Supreme Judicial Court been hesitant in enlarging the scope of the writ of error to meet new state needs. The Supreme Judicial Court wrote:

> "Reexamination of the scope of remedies is not unusual, and may be essential, to meet evolving constitutional interpretations. An example of this is the gradual and necessary expansion of the statute writ of error (G.L. c. 250, §§1, 9) as a postconviction remedy broad enough to deal with constitutional problems arising under recent decisions of the Supreme Court of the United States. Compare *Blankenburg* v. *Commonwealth*, 260 Mass. 369, 376, S.C. 272 Mass. 25, 28, with

We also think that where the state's highest court has never considered a state statute in light of an equal protection claim, that this constitutes "special circumstances" in reverse, compelling the federal courts to require exhaustion as a matter of good judicial policy as well as comity.

Secondly as we read the opinion of the Court below, it erred in its understanding of the Massachusetts practice. Clearly, such an error could not have occurred in the state court. The requirement of exhaustion then would have clarified the local practice:

> The requirement rests also upon considerations of practical efficiency. The issues presented often concern local attorneys and court personnel, and arise in a context of local procedures and practices, with which state courts are familiar. They may be resolved most effectively by those tribunals. The requirement serves the interests of the federal courts. "Indeed, any other rule would visit upon the federal courts an impossible burden, forcing them to supervise the countless state criminal proceedings in which deprivations of federal constitutional rights are alleged." Wade v. Mayo, 334 U.S. 672, 679-680, 68 S. Ct. 1270, 1274, 92 L. Ed. 1647 (1948)."
>
> *Rose* v. *Dickson,* 327 F.2d 27, 28 (9th Cir. 1964)

Thirdly, the Court below found as to exhaustion requirement "[P]etitioner presented the court with an opportunity to apply controlling legal principles to the facts

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Brown v. *Commonwealth*, 335 Mass. 476, 479-480; *Sandrelli* v. *Commonwealth*, 342 Mass. 129, 141-143; and *Letters* v. *Commonwealth*, 346 Mass. 403."
Shoppers' World, Inc. v. *Board of Assessors of Framingham*, 348 Mass. 366, 376, fn. 9 (1965).
See *Cortellesso* v. *Commonwealth*, 354 Mass. 514, 518 (1968).

bearing upon [his] constitutional claim. *United States ex rel. Kemp* v. *Pate,* 7 Cir., 1966, 359 F.2d 749, 751; cf. *Wilbur* v. *Maine,* 1 Cir., 1970, 421 F.2d 1327. That is enough to satisfy the requirement of the exhaustion of the doctrine. *Sullivan* v. *Scafati,* 1 Cir., 1970, 428 F.2d 1023, 1024. N. 1. . . . .'' *Connor* v. *Picard,* 434 F.2d at 674. (A. 6).

A most obvious and apparent distinction between this case and *United States ex rel. Kemp* v. *Pate,* is that in this case, only the state court has the authority to find the State Legislature had a permissible legislative state purpose. In *Kemp,* there was concurrent jurisdiction to determine the voluntariness of a confession. Moreover, in all confession cases, all aspects of the confession should be considered by the reviewing courts (as well as the trial courts). But why should a Massachusetts court decide a federal constitutional issue when the only question before it is whether the statute violates the principles announced in *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329 (1857)? This question is all the more apt in view of the fact that this Court disagreed with *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329 (1857). See *Hurtado* v. *California,* 110 U.S. 516, 521-522.

We note that the Court below found that the Massachusetts Supreme Judicial Court was not "even minimally persuasive'' *Connor* v. *Picard,* 434 F.2d at 676 (A 9). In view of the fact that the equal protection claim was never made to our court, we think this statement is unfair to our highest court. A court, which to our knowledge at least, has always enjoyed a prestigious reputation for judicial excellence, competence and integrity.[5]

We think the Supreme Judicial Court of the Common-

[5] We do not mean to suggest that federal courts must always be "persuaded" by state court opinions. Rather, we suggest that the state courts be given the opportunity to consider the issue so that the federal courts might be "persuaded" by an opinion which is directed at the issue. Nor are we suggesting that the court below meant anything other than the fact that they were "unpersuaded."

wealth of Massachusetts should have been given opportunity to construe its own statute in light of the constitutional challenge.

B. In our view, the court below also erred in impermissibly extending the scope of review in a federal habeas corpus proceeding. Since, the Court below raised the issue of equal protection *Sua Sponte,* it appears to us that the Court treated this claim as "plain error." It is, of course, the federal rule that "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rules Crim. Proc. 52(b). Of course, . . . "[T]he whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Townsend* v. *Sain,* 372 U.S. 293, 311 (1963).

We realize that no particular form of words or phrases is essential to raise a constitutional issue. The only requirement being that the claim and the ground therefor be brought to the attention of the state court with fair precision. This minimum standard was not met in this case.

We note also that the Court below found the opinion of the two dissenting justices more in accord with their own viewpoint. *Connor* v. *Picard,* 434 F.2d at 675 (A 8). The dissenting judges however were not concerned with a constitutional claims based on equal protection. The dissenting justices were concerned with the interpretation of state law. In our view the court below's agreement with the dissenters as to the proper interpretation of state law caused it to impermissibly enlarge its scope of review to general appellate review of a criminal case. *Townsend* v. *Sain,* 372 U.S. 293, 311 (1963). The court below there used Equal Protection Clause as . . . the usual last resort of constitutional arguments to point out shortcomings . . ." *Buck* v. *Bell,* 274 U.S. 200, 208.

Finally, a court of appeals which perceives a constitutional claim not raised in the federal district court should, in our opinion, at the very least, give the federal district court an opportunity to consider the issue and perhaps hold a plenary hearing. See 28 U.S.C. 2254.[6]

We think that the Court below erred in reviewing a claim not presented by the petition for habeas corpus and not raised or decided by the state court or the federal district court. The court below also erred in not requiring Connor to exhaust his state remedies, absent evidence of "special circumstances" to justify bypassing the state court.

> "[T]he relation of the United States and the Courts of the United States to the States and the courts of the States is a very delicate matter."
> *Terminiello* v. *Chicago,* 337 U.S. 1, 11 (1948) Mr. Justice Frankfurter dissenting.

III. The John Doe Procedure Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

In *Snowden* v. *Hughes,* 321 U.S. 1, 11, (1944) this Court wrote:

> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

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[6] The Court below has, on other occasions, held that "although petitioner may now have exhausted his state remedies with regard to that confession, the claim *must first be raised in the federal district court before we can consider it.*" *Michaud* v. *Robbins*, 424 F.2d 971, 973 fn. 2 (1st Cir. 1970) (emphasis supplied).

Thus, in our view, where state officials *meticulously follow state law*, it is clear that there is no violation of the equal protection clause, absent any evidence to indicate that the statute resulted in an "invidious discrimination" against an individual per se or against any readily identifiable group. The Court below did not find any such evidence. The Court erred in our opinion because it misunderstood the Massachusetts practice. The Court below apparently was unaware of the fact that the substitution of the name had to be by a court. Accordingly, it found that the state procedure as they understood it violated Equal Protection Clause. The Court below misconceived the Massachusetts practice and therefore it reached an erroneous conclusion.

A. A Statute Which Requires a Judicial Finding of Cause Before Entering a Name Is Not Arbitrary.

The court below erred in holding that the John Doe procedure violates the equal protection clause of the Fourteenth Amendment. As we read the opinion, their conclusion was reached on a misconception as to the construction and application of G.L. c. 277 §19.

Under Massachusetts procedure, indictments are returned to court and are a part of the court's records. See, e.g., *Commonwealth* v. *Smyth,* 65 Mass. (11 Cush.) 473, 476 (1853). *Grand Jurors for Worcester County* v. *The Commissioner of Corporations and Taxation,* 329 Mass. 89, 91 (1952).

"The indictment is merely an accusation or charge of crime." *Commonwealth* v. *Woodward,* 157 Mass. 516, 518 (1893). *Commonwealth* v. *Geagan,* 339 Mass. 487, 498 (1959), certiorari denied *sub nom. Geagan, et al.* v. *Massachusetts*, 361 U.S. 895 (1959).

Further, under Massachusetts law the grand jury is considered an appendage of the court. See *Heard* v. *Pierce,* 62 Mass. (8 Cush.) 338, 340-341 (1851); *Commonwealth*

v. *McNary*, 246 Mass. 46, 50 (1923); *Grand Jurors for Worcester County for the Year 1951* v. *Commissioner of Corporations and Taxation*, 329 Mass. 89, 91 (1952).

A Suffolk County Grand Jury returned the indictment to the court signed by the foreman and by the assistant district attorney (A. 72). The indictment charged two persons with a homicide on May 1, 1965, in Suffolk County (A. 71). The name of one defendant was set forth, and the grand jurors stated that they did not know the name of the co-defendant. Shortly thereafter, Connor was arrested for this crime (A. 71, 83).[7] The assistant district attorney then filed a motion in Suffolk Superior Court asking that Connor's name be substituted for the "John Doe" returned by the Grand Jury (A. 73).

The Chief Justice of the Commonwealth "determined that the true name of John Doe . . . to be James J. Connor . . . order[ed] the name of James J. Connor to be entered on the record (A. 59).

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[7] It should be again noted that the issue of what facts were stated to the Chief Justice has not been litigated in either the Massachusetts courts or the federal district court. Connor's contention has always been that he had a constitutional right to be indicted by a grand jury and that the grand jury lacked evidence of a specific nature as to his identity.

The issue of what information the officers had who arrested Connor has likewise never been litigated. We note that in the hearing before the Chief Justice dated August 9, 1965 the court did state that it had an affidavit that this man was John Doe (A. 84). The precise standard as to the degree of proof required in a grand jury proceeding is not clear under Massachusetts case law. In a long series of cases, our court has held that they will not inquire into the nature, quality and quantity of evidence before a grand jury. *Commonwealth* v. *Galvin*, 323 Mass. 205, 211-212. See also *Commonwealth* v. *Knapp*, 26 Mass. (9 Pick.) 495; *Commonwealth* v. *Woodward*, 157 Mass. 516; *Commonwealth* v. *Lammi*, 310 Mass. 159; *Commonwealth* v. *Ventura*, 294 Mass. 113, 120, 121; *Commonwealth* v. *Walsh*, 255 Mass. 317, 319; *Commonwealth* v. *Baron*, 356 Mass. 362, 364 Mass. Adv. Sh. (1969) 1233, 1237. See also *Costello* v. *United States*, 350 U.S. 359 (1956).

Thus the finding of the court below that there was no cause to

The entry of a defendant's name on such an indictment "stands on the same footing as if the true name of the defendant had been inserted in the indictment when returned by the grand jury." See *Fogg* v. *First National Bank of Boston,* 268 Mass. 25, 28 (1929). The name may only be entered after the *court* makes the necessary findings and also determines that the entry of the name may only be accomplished if "no injustice be done to any defendant." *Commonwealth* v. *Gedzium,* 259 Mass. at 461.

The protection against unfounded accusations is not lost by this procedure. The grand jury has merely invoked the aid of the court as it can do in Massachusetts (See, e.g., *Commonwealth* v. *McNary,* 246 Mass. 46, 50 (1923)) by returning to the court an indictment and asking the court to use its power to bring the defendant to trial, if the court determines the true name of the perpetrator of the crime.

Thus, under the John Doe procedure a judge must find that the accusation is not unfounded both as to the crime and as to the name of the accused.

The statute has been authoritatively construed by the Supreme Judicial Court to require the prosecutor to ask for the substitution of the name. However, it is the court which has the power to substitute a name, and not the prosecutor. See *Commonwealth* v. *Capland,* 254 Mass. 556, 558 (1926); *Commonwealth* v. *Gedzium,* 259 Mass. 453, 461 (1927);

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place Connor on trial is simply not supported by the record. We would also point out that in the Supreme Judicial Court only the Dohertys contested the sufficiency of the evidence. Connor did not contest the sufficiency of the evidence against him either at trial or in the Supreme Judicial Court, 353 Mass. 197, 202 (A. 116, 117).

The Court below also found that in light of the "Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination." *Connor* v. *Picard,* 434 F.2d at 676. The only statement by anyone on this record as to the extent of this practice is the Chief Justice's comment in the August 9, 1965 hearing that "this was a very common procedure" (A. 79).

Commonwealth v. *Doherty,* 353 Mass. 197, 206 (1967), *certiorari denied* 390 U.S. 982 (1968); *Commonwealth* v. *Baldassini,* 1970 Mass. Adv. Sh. 989, 992.

The procedure permitted here may be analogized to the requirements set forth by this Court in the area of the Fourth Amendment. The prosecutor may not act with the intervention of a "neutral and detached magistrate." The entry of the name is "decided by a judicial officer, not by a policeman or government enforcement agent." See *Johnson* v. *United States,* 333 U.S. 10, 13, 14 (1948); cf. *Coolidge* v. *New Hampshire,* U.S. (slip opinion 5, 6).

Thus, the John Doe procedure does not omit "the indispensable condition that 'the inferences from the facts which lead to the complaint . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' ". *Mancusi* v. *DeForte,* 392 U.S. 364, 371 (1968).

The fact that judicial intervention is required before a person may be named and before the name may be substituted is, we think, a significant difference from the general warrant held invalid in *Commonwealth* v. *Crotty,* 92 Mass. (10 Allen) 403. A difference which this Court at least has always emphasized in the Fourth Amendment cases.

The "John Doe" process does not deprive an accused of the essential elements of his "interest" in grand jury indictment. A "John Doe" indictment and a "name bearing" indictment equally fulfill the purpose of the indictment requirement that a man be indicted by a grand jury "to limit his jeopardy to offenses charged by a group of fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). See *Commonwealth* v. *Cooper,* 264 Mass. 378, 381-382 (1928); *Commonwealth* v. *Bracy,* 313 Mass. 121, 126 (1943). The indictment for murder is in the statutory form which has been held sufficient. See *Commonwealth* v.

Jordan, 207 Mass. 259, 265-268 (1911), *affirmed sub nom. Jordan* v. *Massachusetts,* 225 U.S. 167 (1912). Thus, the petitioner was fully informed of the charges against him. Cf. *Russell* v. *United States,* 369 U.S. 749 (1962).

The indictment here contains all the elements of the offense intended to be charged and apprised Connor of the offense which he must be prepared to meet. The indictment may be pleaded by Connor in bar of further jeopardy. The indictment, therefore, is constitutionally valid.

The Massachusetts statutory procedure does not mean that no cause need be shown before a person stands trial. It merely provides that a grand jury which has investigated a case may make a charge, naming those whose names the grand jurors can ascertain and indicating to the court that they have cause to believe another or others are also involved. Thereafter, the courts must find probable cause to believe that a certain person's name should be entered on the court records. And that in so doing no injustices done to any person, *Commonwealth* v. *Gedzium,* 259 Mass. at 461.

This procedure as enacted by our legislature and construed by our highest court in no way permits "the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant". *Connor* v. *Picard,* 434 F.2d at 676 (A. 9) is an incorrect assessment of the Massachusetts procedure.[8]

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[8] In our view, footnote 5 also misconceives Massachusetts law. The grand jury foreman has signed an indictment alleging a crime on a particular date and place, and has named an accomplice. The indictment has been returned to a court which must make requisite finding before allowing the substitution. Therefore, the prosecutor is not at liberty to do what he pleases as suggested by the court below. This misapplication of the procedures may, perhaps, have come into being because this issue in this context was not presented to the Massachusetts courts.

Footnote 3 is inapplicable to the instant case. In *Commonwealth* v. *Cooper,* 264 Mass. 378, (1928), the words "wilfully and maliciously" were left. Those words are *essential to the charge* and went

On this record, it is quite clear that it was the court who determined cause, not the prosecutor (A. 59). We think, therefore, that is was this misconception which may have led the Court to reach its erroneous conclusion that the statute violates the Equal Protection Clause of the Fourteenth Amendment.

B. The Manner of Amending the Indictment to Include the Name of the Respondent Was Constitutionally Permissible and Violated No Federal Constitutional Rights.

Courts have uniformly permitted corrections and changes in name (admittedly, the changes were lesser in degree than the instant case but the changes were made without the same legislative mandate.) See e.g. *U.S.* v. *Campbell,* 235 F.Supp. 94, 96 (E.D. Ten, 1964); *U.S.* v. *Fawcett,* 115 F.2d 764, (3rd Cir. 1940); *Dye* v. *Sacks,* 279 F.2d 834 (6th Cir. 1960).

In *U.S.* v. *Fawcett,* 115 F.2d 764, 767, the Court said:

> "... a name is not of the substance of an indictment. And a person may well be indicted, without mention of any name, and designating him as a person whose name is to the grand jurors unknown."

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to the *core* of whether the indictment charged a *crime*. See *Russell* v. *United States*, 369 U.S. 749 (1962).

Commonwealth v. *Snow*, 269 Mass. 598, 610 (1930) held that the change of the name of the person threatened was not permitted on the ground that a "conviction or acquittal on the indictment as drawn would not be a bar to a new indictment in the form to which it was changed by the amendment." Again, the indictment in which the grand jury has set the charge certainly has sufficient certainty to bar another indictment for the same offense. The respondent has never argued otherwise.

None of the Massachusetts cases cited by the Court below requires a finding that Massachusetts law does not support the interpretation given this statute in *Commonwealth* v. *Gedzium*, 259 Mass. 453, 457, 461 (1927).

Clearly, of course, the Commonwealth needed the legislative mandate, otherwise such an amendment would not be possible in Massachusetts, *Commonwealth* v. *Gedzium,* 259 Mass. at 457. With the statute, and the procedure required before any amendment may be allowed, the following language of *Fawcett* becomes applicable to this case:

> Since the defendant was in no wise misled or prejudiced in any degree whatever by the change and no substantive right affected thereby, it is clear that the name by which he was indicted could have nothing to do with the question of his guilt, the character of the offense, the nature or degree of criminality or punishment attached to it, or with the evidence which should be sufficient to warrant conviction. Therefore the change herein made was only one of form and comes within the meaning of the statutes herein referred to. It was properly allowed. (115 F.2d at 767.)

Tested by those standards, the substitution of Connor's name was not error. The change did not substantially affect the rights of the defendant and the fairness of the proceeding.[9]

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[9] The state cases on amendment of the name of the accused all appear to be decided as a matter of state law, and not as a matter of federal constitutional rights. See, for example, *People* v. *Erving*, 189 Cal. App. 2d 283, 11 Cal. Rptr. 203 (1961) certiorari denied 368 U.S. 960 (1962) where the California court held that a "Jane Doe (Charlene)" indictment with a mis-description was not held to be error. The state cases are, for the most part, collected in 14 ALR 3d 1358.

The following states have the same or similar statutes to the Massachusetts statute in the instant case. Arizona Revised Statutes Anno. — Rules of Criminal Procedure, Rule 117; Deering's California Codes — Penal Code §953; Idaho Code — Gen. Laws of Idaho Anno., §19-1412; Iowa Code Anno. — §773.8 (formerly §773.7 of Code 1962); West's Louisiana Statutes Anno. — Code of Criminal Procedure, Art. 466; Michigan Compiled Laws Anno., §767.49; Minnesota Statutes Anno., §628.13; Mississippi Code 1942 Anno., §2452; Nevada Revised Statutes, Chap. 173, sec. 105; New Mexico Statutes

In *United States* v. *Skeen,* 126 F. Supp. 14 (W.D. West Virginia, 1954) the federal district court found that an amendment from William H. Marsh to William Howard Morris was not a proper basis for habeas corpus relief. The West Virginia statute was similar to our Massachusetts statute. (See p. 16).

In *United States* v. *Campbell,* 235 F. Supp. 94, 96 (E.D. Tenn. 1964), the Tennessee federal district court found that an amendment changing the name "Bill Campbell" to "Charles Andrew Campbell" was one of "form" cf. *Connor* v. *Picard,* 434 F.2d at 675 (A. 8).

Chow Bing Kew v. *U.S.,* 248 F.2d 466, 468 (9th Cir. 1957) certiorari denied, 355 U.S. 889 (1957) is not authority for the claim that "John Doe" indictments are invalid. In that case the court found that "[S]ince no one is named as committing the crime in the second count, the district court had no jurisdiction in personam to try Chow." The decision was based upon the construction of The Federal Rules of Criminal Procedure, Rule 7(c).

In *Lee Gim Bor* v. *Ferrari,* 55 F.2d 86 (1st Cir. 1932) the Court did not consider it necessary to decide whether a warrant would be sufficient if New York had followed its statutory procedure in amending a "John Doe" indictment because "*no such* amendment or addition as permitted by the *statutes* of that state was had, or is claimed to have been had before the demand relied on was made." Thus, the question of whether the amended indictment would have

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Anno., Chap. 41-6-10; Consolidated Laws of New York Anno., Code of Criminal Procedure, sec. 277 (repealed as of Sept. 1, 1971); North Dakota Century Code, Chap. 29-11-14; Oklahoma Statutes Anno., 22 §409.3; Oregon Revised Statutes, 132.540 (c); General Laws of Rhode Island, 12-12-2; South Dakota Compiled Laws Anno., 23-32-12; Tennessee Code Anno., 40-1803; Texas — Vernon's Annotated Code of Criminal Procedure, Art. 26.10; Revised Code of Washington, 10.46.060.

been sufficient to support the extradition warrant, had the amendment procedure been followed, was not decided.

In *United States* v. *Doe,* 127 F. 982, 984 (1904) the Court, by way of dictum, held that "an indictment (i.e. "John Doe") thus defective *would not be held void upon collateral attack*; . . ." Legislation is needed authorizing such a procedure but such legislation is not constitutionally impermissible.

The closest case to the present one arose in New York under their Code of Crimin. Procedure — Sec. 277. After the New York courts denied relief the petitioner filed a habeas corpus petition, alleging among other things, that the New York "John Doe" Procedure violated the Equal Protection Clause. The Second Circuit held that:

> The fact that Morrison was under arrest on suspicion when the indictment was handed down is irrelevant since his name was not mentioned to the grand jury and the prosecuting authorities at that time had no evidence to connect him with the crimes. Morrison, who was represented by counsel, made no objection to the amendment, or to the amended indictment at any time during the trial. The right to challenge the sufficiency of an indictment may be lost where the finding of guilt by the trial jury "gives the same or greater assurance against oppression and persecution as an indictment based on sufficient evidence is intended to give before trial has been had." People v. Nitzberg, 289 N.Y. 523, 530, 47 N.E.2d 37, 41. Nor was Morrison denied equal protection of the laws because affirmance of his conviction shows that under like circumstances defendants in other cases would be subject to the same legal rules as were applied in his case.
>
> Order affirmed.

United States ex rel Morrison v. *Foster,* 1949 175 F.2d 495, 497, 498 certiorari denied sub nom. *Morrison* v. *Foster,* 330 U.S. 831 (1946).[10]

C. The Statute Serves Valid State Purposes.

Since a statutory classification may be valid and permissible if it includes "all persons who are similarly situated with respect to the purpose of the law"[11] the question arises, does the law serve any valid purpose?

We think the answer quite obviously is "yes".

The Constitution of the Commonwealth of Massachusetts does not specifically mention indictment by a grand jury. Article XII of the Bill of Rights provides that:

> "No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived

[10] The only distinguishing feature between the Massachusetts case and the New York case (aside from the passage of time) is the fact that no objection was made originally in the New York case. That does not appear to us to be a significant distinction in view of the constitutional issue raised. See *O'Connor* v. *Ohio,* 385 U.S. 92, 93 (1966). Cf. *Terminiello* v. *Chicago,* 337 U.S. 1, 8. (The dissenting opinion of Mr. Justice Frankfurter.)

[11] Tussman and tenBroek, *The Equal Protection of the Laws* 37 Calif. L. Rev. 341, 346 (1949). We recognize that although the rule appears simple, it is exceedingly complex and difficult to apply.

of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

In 1857, The Supreme Judicial Court construed Article XII to mean that a sentence to a state prison, or capital punishment may not be imposed unless the criminal proceedings were commenced by an indictment or presentment of a grand jury. *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329, 342-349 (1857). This Court disagreed and found that indictment by a grand jury was not a constitutional requirement binding on the states and evidently found Judge Merrick's dissenting opinion more persuasive. *Hurtado* v. *California,* 110 U.S. 516, 521, 522, 526 (1883). The *Jones* decision has been extensively reviewed and commented upon in Massachusetts.[12]

The Supreme Judicial Court, in dictum, in 1889 wrote that there was much that could be done in "simplifying indictments" that could be done by the Legislature, except that "it could not authorize the omission of allegations necessary to describe a specific crime." *Commonwealth* v. *Freelove,* 150 Mass. 66 (1889).

The statute was first passed in 1899 as section 8 of Chapter 409.[13]

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[12] See, e.g. Grinnell, *Grand Juries, The Meaning of the Phrases "The Law Of The Land" and "Due Process of Law,"* And The *Extent Of The Constitutional Powers Of The Massachusetts Legislature To Classify Offenses and Regulate Criminal Procedure*, 6 Mass. L.Q. (No. 5) 214, 224 (1921). See also *Survey of the Grand Jury System* 3 Portia Law Journal 70, 95, 108. See also *The Grand Jury System In Massachusetts*, A Survey, Vol. II, Suffolk University Law Review, 201, 202-203.

[13] The only legislative history we found as to this statute is the following:

In 1897, the General Court of Massachusetts passed a resolve

We think that the proper functioning of grand juries and the simplification of criminal pleadings in a state are valid grounds for a state legislature to enact remedial legislation.

In 1927, Chief Justice Rugg, writing for the Supreme Judicial Court found that the statute did not violate state law because "the grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge. . ." *Commonwealth* v. *Gedzium*, 259 Mass. at 461.

We think Chief Justice Rugg has stated a valid purpose for the law. It should be pointed out that in Suffolk County grand jurors are only sworn for six months G.L. c. 277 §2. The other grand jurors serve for one

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to appoint three persons "learned in the law to investigate and report upon a plan for the simplication of criminal pleadings, and to prepare a schedule of forms of pleadings to be used in criminal cases." See Resolve, Chapter 85, *Massachusetts Acts and Resolves*, 1897, p. 621.

In 1899, the Commissioners sent their report to the Governor with a draft of a bill. The Governor transmitted both the report and the bill to the Massachusetts General Court. The bill was enacted into law as chapter 409 of the acts of 1899. The present Chapter 272 §19 first appears as c. 409 §8. The Commissioners did not specifically mention c. 409 §8 in their report to the Governor.

As a result of the report chapter 409 was passed. The statutes which were passed for the *first* time in 1899 and incorporated into the revised laws of 1902 and which have been carried forward to this day are as follows: G.L. c. 277 §17; §18; §19; §20; §21; §22; §24; §25; §26; §27; §28; §29; §31; §32; §34; §36; §37; §41.

From the marginal reference on St. 1899, c. 409, §8, it appears that it is founded in part at least upon St. 1895, c. 429, §6, which reads as follows:

> "No plea of misnomer shall be received to a complaint or indictment for violation of any law relating to lotteries, policy lotteries or policy, the selling of pools or registering of bets, or any form of gaming; but the defendant may be arraigned and tried, and if convicted, sentenced and punished, under any name by which he is complained of or indicted. No such com-

year but only at the criminal sittings of the court. G.L. c. 277 §1. These sittings are established by the Chief Justice G.L. c. 212 §14A. (Since the *Gedzium* case, Middlesex County also has six month grand jury sittings. G.L. c. 277 § 2B). Sitting has been held to replace the common law "term." See *Fine* v. *Commonwealth,* 312 Mass. 252, 255 (1942).

This statute permits the grand jurors whose "sittings are infrequent" to discharge their duties and return valid state indictments against those who commit crimes but are able to shield their names from the grand jury within the time period that the grand jurors are meeting. See *Commonwealth* v. *Gedzium*, 259 Mass. at 461 (1927).

In addition, the statute permits a Suffolk County Grand Jury (or Middlesex) to return to the court a joint indictment charging a particular crime and stating that one person's name is unknown to them. This statute permits

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plaint or indictment shall be abated, quashed, or held insufficient by reason of any alleged defect, *either of form or substance, if the same is sufficient to enable the defendant to understand the charge and to prepare his defence.* No variance between such complaint or indictment and the evidence shall be deemed material, unless in some matter of substance essential to the charge under the rule above prescribed."

Section 8, c. 409 of the Acts of 1899 reads as follows:

"If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name, with an allegation that his real name is unknown, *or by such other description as may be found practicable.*

"If a defendant is indicted by a fictitious or erroneous name, it shall not be ground for abatement, but if in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment."

Sec. 19, c. 218, R. L. modified Sec. 8, c. 49 of Acts 1899 so that it reads like the present c. 277, §19 i.e.: that when his name is discovered it may be added "With reference to the fact that he was indicted by the name mentioned in the indictment."

There have been no further changes in the statute. The Commissioners entire report is found in Documents, The *Senate Commonwealth of Massachusetts*, 1899, 200-357.

this to be done within their short life span. We think this procedure provides the grand jury with the assurance that their investigations will be judicially disposed of according to law, even though they themselves are unable to learn of the name of the perpetrator.

The statute provides a means for one grand jury to complete an entire investigation even though there remains a person whose name is unknown to them and even though the life span of the grand jury is short.

Under Massachusetts law a grand jury "may at any time apply to the court for instructions and invoke its power for aid and protection in the performance of its duties." *Commonwealth* v. *McNary,* 246 Mass. 46, 50 (1923) (dictum).

We think that a statute which assists a grand jury which has completed an investigation and who has been hampered in ascertaining the name of one who committed a crime, ought to be allowed to return such an indictment to the court, if permitted to so do by state law.

Thus in construing that statute as consistent with the provisions of Article XII, the Massachusetts Supreme Judicial Court concluded that the legislature directed its concern to a particular classification, to wit, a classification where the grand jury, although able to conclude that there was probable cause to believe that all of the elements of the crime were present, was unable to determine the perpetrator's name or a description which would readily admit to any degree of particularization. The court further noted that this classification was just and reasonable, lest an undue preference be accorded to the cunning, the discreet, or the disguised, whose actual description could not be reasonably particularized to any degree of certainty. Under the court's interpretation of the statutory provisions, *prompt* and certain justice would befall everyone whose crime the grand jurors investigated.

We point out that the Supreme Judicial Court found in the instant case that "circumstances that require protective custody strongly suggest the risk of intimidation and other improper pressures" of witnesses. 353 Mass. at 211, (1967) (A. 124). Of course, such conduct would support the use of the statute under the reasoning of *Gedzium,* 259 Mass. at 461. We want to make it very clear that we have no knowledge or facts one way or the other that these were the circumstances which "hampered the grand jury in this case." All we are suggesting is that there are valid state reasons for enacting such statutes. This statute serves valid Massachusetts purposes.

D. The Massachusetts Statute Does Not Violate the Equal Protection Clause.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."
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> *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886).

The equal protection clause of the fourteenth amendment, in our view, prohibits discriminatory administration of valid statutes.

Clearly, the Massachusetts statute on its face is fair and valid. It certainly is within the power of a state legislature to provide courts with a means of correcting misnomers and the like in criminal cases. In *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) the statute on its face made an unequal and unreasonable distinction between penalties for similar crimes. *Skinner,* supra, 316 U.S. at 541-542. The Oklahoma statute as written, therefore, was constitutionally infirm.

As we read the decisions of this Court a statute must be tested on its face and as applied. The decisions require a state to measure its statutes in light of three questions. 1. Does the classification result in discrimination against a disadvantaged class? 2. Does the discrimination relate to an interest that is "basic" or "fundamental"? 3. Does the state's asserted justification withstand "strict scrutiny"? See *Skinner,* supra at 541.

The Massachusetts statutes applies to all types of misnomers in criminal cases. The classification, therefore, does not concern itself with race, color, national origin, age, sex, political leanings, financial status or any other readily identifiable group. On its face, the statute is a perfectly proper criminal pleading statute. The statute does not, on its face, discriminate against a disadvantaged group.

This Court has held that a person has no right to be "indicted by a grand jury." *Hurtado* v. *California,* 110 U.S. 516 (1884). The interest therefore, is not "basic" or "fundamental" as this Court has previously used these words. See also "Developments in the Law—Equal Protection", 82 Harvard Law Review 1120-1123, 1127-1131 (1969).

The state, of course, controls its criminal procedure subject to the Constitution and judicial interpretations. It has a very real interest in the fair and even handed administration of justice. The state also has a strong interest in the efficient administration of its criminal justice system. Therefore, the statute has a permissible purpose and the state has a compelling need for such a statute. Thus, under the "tests" set forth in *Skinner,* the Massachusetts statute is not facially invalid. The Massachusetts statute has no harmful impact on a constitutionally protected interest as did the Oklahoma statute.

The question then arises is the law "administered by public authority with an evil eye and an unequal hand" *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373. A law fair on its

face only violates the equal protection if it is discriminately enforced.

The Court below apparently concluded that Connor was "singled out" for different treatment and that difference not based on any reasonable or permissible purpose. *Connor* v. *Picard*, 434 F.2d at 676 (A. 9, 10).

The record in this Court, and the record which was in the Court below provide no factual support for the Court's conclusion that there was an "arbitrary decision to make such a delegation in petitioner's case." *Connor* v. *Picard*, 434 F.2d at 676. (A. 10). The only fact, if it can be called a fact, as to the frequency of the alternative method of naming an accused, is the statement by the Chief Justice that "this is a very common procedure (A. 79). Compare *Yick Wo*, 118 U.S. at 359 where facts showed "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception . . . were granted." 118 U.S. at 359 with the record in this case. Clearly, no such showing has been made or even attempted to be made in this case.

A person claiming discriminatory enforcement of a penal law must show *purposeful or intentional* discrimination. See *Sunday Lake Iron Company* v. *Wakefield*, 247 U.S. 350, 353 (1918). See also *Edelman* v. *California*, 344 U.S. 357, 359 where this Court recognized "the *necessity of showing systematic or intentional discrimination.*" In the absence of both a claim of intentional discrimination (see petition for habeas corpus A. 17-24) and a showing of systematic or intentional discrimination, there is no basis on this record for a finding that the Massachusetts statute was being administered "by public authority with an evil eye and an

unequal hand.'' *Yick Wo*, 118 at 373. There is no record support for any finding of intentional discrimination in the law as applied.

The Massachusetts statute on its face does not ''lay an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has ''not made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.'' *Skinner* v. *Oklahoma,* 316 U.S. at 541.

Moreover, the record does not support any finding of intentional or systematic discrimination. There is no basis for concluding that a valid law is being unfairly administered. Compare *Yick Wo* v. *Hopkins*, 118 U.S. 356. See generally, Comment, *The Right To Nondiscriminatory Enforcement Of State Penal Laws,* Columb. L. Rev. 1103 (1961).

Does the law violate the Equal Protection Clause? We think not.

Since the classification under the Massachusetts statute does not of course concern itself with race, color, national origin, age, sex, political leanings, financial status or any other readily identifiable group, the equal protection contention should be tested by the following set of ''rules'', to wit (*Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 61, 78-79 (1911).

> ''1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
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> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Obviously, if the *Lindsley* "rules" are applied to the Massachusetts statute the reasons stated in *Commonwealth* v. *Gedzium,* 259 Mass. at 461 are adequate to support the classification made by the state statute.

Further, Equal Protection has never meant that the states were forbidden to make any differences in treatment.

In *Graham* v. *West Virginia*, 224 U.S. 616, 630 (1912) this Court wrote

> "The 14th Amendment is not to be construed 'as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. Standard Oil Co. v. Tennessee, 217 U.S. 413, 420, 54 L. ed. 817, 820, 30 Sup. Ct. Rep. 543. A state may make different arrangements for trials under different circumstances of even the same class of offenses (Brown v. New Jersey, 175 U.S. 172, 177, 44 L. ed. 119, 121, 20 Sup. Ct. Rep. 77; Missouri v. Lewis (Bowman v. Lewis) 101 U.S. 22, 31, 25 L. ed. 989, 992; Hayes v. Missouri, 120 U.S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Lang v. New Jersey, 209 U.S. 467, 52 L. ed. 894, 28 Sup. Ct. Rep. 594. . . ."

In *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1957) this Court again upheld reasonable differences in treatment.

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. Cf. *Dominion Hotel, Inc.* v. *Arizona,* 249 U.S. 265; *Great Atlantic & Pacific Tea C.* v. *Grosjean,* 301 U.S. 412; *New York Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535.

Since equal protection does not require identity of treatment, the question arises are the two Massachusetts procedures "so disparate . . . as to be wholly arbitrary." *Walters,* 347 U.S. at 237.

On this record, it is clear that respondent had fallen far short of sustaining his burden of showing that the statutory classification "is essentially arbitrary." Moreover, it is clear — notwithstanding the allocation of the burden of proof — that the statutory classification is in fact reasonable. As noted by the Massachusetts Supreme Judicial Court, the statute assists the grand jury to perform its solemn duty. See *Commonwealth* v. *Gedzium,* 259 Mass. at 461.

There was no foundation in this record to show that petitioner was "singled out" for special treatment.

We realize that the Equal Protection Clause is not merely limited to the protection of existing rights but that it creates a right to equal treatment with respect to any benefit conferred by the state, even if there is no underlying right to the benefit itself. The Court below erred in finding that the "benefits" a finding of cause to place a person on trial and protection against unfounded accusation were lost. *Connor* v. *Picard,* 434 F.2d at 675. Neither

of these benefits are lost under the Massachusetts statute as construed by the Supreme Judicial Court (brief, supra p. 22).

The Court below had no basis for concluding that judicial protection of personal interests rather than the grand jury's protection would be such a "disparate difference" in the treatment of persons as to be "wholly arbitrary."

The Massachusetts statute as applied does not violate the pledge of the "protection of equal laws". *Yick Wo,* 118 U.S. at 369. The Court below's insistence of identity of treatment is, we think, erroneous and not in accord with the decisions of this Court.

We do not read the decisions of this Court as holding that a state statute, fair on its face may be found to violate the Equal Protection Clause, in the absence of evidence in the record that the statute as applied either discriminates against an individual or a class or that an individual or a class has been singled out for different treatment without justification.

Is there any basis on this record to show that Connor suffered "a severe detriment or any detriment" from the application of the statute? Neither Connor's state court motions nor his petition for habeas corpus make any such claim. Indeed, the claim is only "a right" to be indicted by a grand jury. (A. 86, 88).

In *Ah Sin* v. *Wittman,* 198 U.S. 500, 508 (1905) this Court affirmed a dismissal of a writ of habeas corpus on the ground that the defendant had *failed to prove discrimination in the enforcement of the gambling ordinance.*

There is no record support for the Court below's conclusion that Connor was discriminated against by use of this general law.

Moreover, this Court in *Yick Wo,* 118 U.S. at 374 wrote of "*discriminations between* persons in similar *circumstances, material to their right...*"

The record in this case does not support any finding that there was any discrimination against Connor, material to his rights.

Of course, had Connor been able to prove that he "lost material rights" by this procedure, it would have been an abuse of discretion for the Chief Justice to have allowed the motion. See *Commonwealth* v. *Gedzium,* 259 Mass. at 461. Such discretion is reviewable under G.L. c. 278, §§33A-33H (The criminal appeals statute.)

Does the fact that the judge had to order the entry of his name present a discrimination between persons similarly situated, and material to their rights? We think not.

It is ironic to us that the Court below, apparently finds that probable cause on the part of a judge is an "arbitrary decision" although this court has held that probable cause on the part of the prosecutor is sufficient to bring an accused to trial. See *Lem Woon* v. *Oregon,* 229 U.S. 586, 587 (1913); *Ocampo* v. *United States,* 234 U.S. 91, (1914); see also *Beck* v. *Washington,* 369 U.S. 541, 545 (1962).

The record does not show "different treatments ... so disparate . . . as to be wholly arbitrary." *Walters* v. *City of St. Louis,* 347 U.S. 231, 237 (1957).

The record below and in this Court does not indicate that judicial discretion is being exercised with "an evil eye and an unequal hand." *Yick Wo,* 118 U.S. at 373.

Since, there is no record support for the Court below's conclusion that Connor had been singled out for different treatment by the state, there was no basis on which to conclude that the Equal Protection Clause had been violated.

If the basis for invalidating state statutes is to be the theoretical possibility of unequal application, then the states must provide identity of treatment. Since this is not possible nor desirable, this Court has wisely found the clause applicable only if the record supports the claim that the law has been unfairly applied or that a benefit was not conferred with an equal hand.

The application of the equal protection clause by the court below, in the absence of any evidence of unfairness, exalted "form over substance contrary to [y]our previous application of the Equal Protection Clause." See *Beck* v. *Washington*, 1962, 369 U.S. 541, 555.

CONCLUSION

Philip J. Picard, Warden, Massachusetts Correctional Institution, Norfolk, Massachusetts respectfully requests this Court to remand the case to the First Circuit Court of Appeals with directions to reverse its order granting the writ and to direct the Court of Appeals to reinstate the order of the district court denying the respondent's petition for the Writ of Habeas Corpus for the reasons stated in his brief.

Respectfully submitted,

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